

Claimant alleges that he suffered a low back injury as a result of performing his regular work activities while employed as a laborer for the respondent. Respondent is a construction company in the business of erecting metal buildings. Claimant worked for the respondent from July 7, 1994 until February 10, 1995, when he was terminated for repeatedly failing to report to work. Claimant first sought medical treatment for his low back with Dr. Charlie Joslin on February 14, 1995. After examining the claimant, Dr. Joslin referred the claimant to Dr. Robert L. Eyster, an orthopedic surgeon in Wichita, Kansas. Dr. Eyster diagnosed spondylolisthesis at L5-S1. Dr. Eyster first prescribed conservative

treatment which failed to relieve claimant from his pain and discomfort. Finally on March 20, 1995, Dr. Eyster performed surgery on claimant's low back resulting in a fusion at the L5-S1 level. Claimant, at the time of the preliminary hearing, had not been released to return to work.

In addition to the claimant's testimony before the Administrative Law Judge, respondent presented testimony of Larry Smith, Personnel Director. Mr. Smith established that the claimant did not inform him that he had a low back injury that was related to his work activities with respondent. Mr. Smith did establish that the claimant told him that he was going to see Dr. Joslin for a personal medical problem, but did not relate the problem to his work. Respondent also took the evidentiary depositions that are a part of the preliminary hearing record of Robert Fisher, Gerald Smith, Terry Hagar and Richard Smith, supervisors for the respondent, who had supervised the claimant at various times while claimant was employed by the respondent. Each of these witnesses testified claimant did not notify them that he had injured his back at work. Also, none of these witnesses could recall claimant having claimed or demonstrated that he had back problems while he was performing the job duties of a construction laborer. Larry Smith also testified that he had not had any contact with the claimant since February 6, 1995, when the claimant indicated he was going to the doctor for a personal problem. Mr. Smith testified that the respondent had no notification that the claimant was relating his low back condition to the work that he performed while employed by the respondent until he received a demand letter from claimant's attorney on May 12, 1995.

The medical records of Dr. Joslin and Dr. Eyster were admitted into evidence at the preliminary hearing. These records indicate that the claimant's low back discomfort and pain was caused by spondylolisthesis at the L5-S1 level, a congenital defect. The medical records do not associate claimant's work activities with the spondylolisthesis condition.

The claimant has the burden of proving by a preponderance of the credible evidence his right to compensation benefits. See K.S.A. 44-501(a) and K.S.A. 44-508(g). The Administrative Law Judge found that the claimant had failed to sustain this burden in this case on both the issue of whether claimant's alleged accidental injury arose out of and in the course of his employment and whether claimant gave respondent timely notice of his accident. The Appeals Board has examined the preliminary hearing evidentiary record and affirms the Administrative Law Judge's decision in reference to both of these issues. The Appeals Board finds that the testimony of the respondent's representatives established that claimant never demonstrated or complained of a back problem while he was employed by the respondent. Their testimony further established that the claimant did not notify any of them that he had a back problem that was caused by his work activities while employed by the respondent. Additionally, the medical records do not relate claimant's low back problem with his work activities. During the testimony of the claimant, he admits that he did not tell any of the respondent's representatives that his back problem was related to his work activities. Consequently, the first notice respondent received that claimant was making a claim that his low back condition was work related, occurred when claimant's attorney sent a demand letter to respondent on May 12, 1995. Accordingly, since the claimant was terminated by the respondent effective February 10, 1995, and notice of the alleged accident was not received by the respondent until May 12, 1995, the Appeals Board finds that the claimant did not give timely notice to the respondent of an alleged accident until ninety-one (91) days after his termination. The notice requirement, which is contained in K.S.A. 44-520, requires the employee to give the employer notice of an accident within ten (10) days or establish just cause within seventy-five (75) days from the date of accident for not giving the ten (10) day notice. In this case, the notice was given in excess of seventy-five (75) days, which bars the claimant's claim for compensation.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes, dated August 2, 1995, should be, and is, hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Wichita, Kansas
Douglas C. Hobbs, Wichita, Kansas
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director